No. 4302

In The United States Circuit Court of Appeals

For The Ninth Circuit

C. R. HOOPER, Doing Business as Hooper Manufacturing Company, L. H. COOLIDGE and C. V. HULL, Copartners as L. H. Coolidge Company, SEATTLE SHIPBUILDING & DRY DOCK COMPANY, a Corporation, UNION OIL COMPANY OF CALIFORNIA, a Corporation, SEATTLE HARDWARE COMPANY, a corporation, and SAMUEL CLARK,

Appellants,

vs.

KUNKLER TRANSPORTATION & TRADING COMPANY, a Corporation, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JEREMIAH NETERER, *Judge.*

BRIEF OF APPELLEES

GRINSTEAD, LAUBE & LAUGHLIN,
Proctors for Fidelity and Deposit Company of Maryland.
314 Colman Building, Seattle, Washington.

HARTMAN & HARTMAN,
Proctors for Kunkler Transportation & Trading Company.
306 Burke Building, Seattle, Washington

THE ARGUS PRESS, SEATTLE

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BRIEF OF APPELLEES

The proctors for the respective parties have stipulated that the sole and only question on appeal is the decision of the court that the surrender of the

vessel by the claimant satisfied and discharged the delivery bond, executed by the claimant and the Fidelity and Deposit Company of Maryland (Apostles, p. 72). The Steamship "Dauntless" was libeled at the instance of the Seattle Shipbuilding & Dry Dock Co. on July 19, 1923, and custody taken by the marshal under process. On July 20, 1923, a claim was filed by the Kunkler Transportation & Trading Company, and a delivery bond for the release of the vessel was filed on the same day with the claimant as principal and the Fidelity and Deposit Company of Maryland as surety. The bond in part recites:

> "And Whereas, it is agreed between the proctors of the libellant and the proctors of the claimant of said vessel that upon the giving of a bond, with surety, in the sum of Six Thousand Dollars ($6,000.00), said vessel may be released. * * *
>
> "The condition of the above obligation is such, however, that if the above-bounden principal shall either pay any judgment and abide by any and all orders and decrees made by said court in the above-entitled cause or in lieu thereof shall redeliver said vessel, with her tackle, apparel and furniture, into the possession of said marshal, and abide by any such judgment as the same may be rendered, or any orders as the same may be made, then this obligation be void; otherwise to be and remain in full force and effect."

This bond was submitted to and *approved* by the proctors for the libellant, subsequently approved by the court and the vessel released. On August 7, 1923, the claimant and surety, in compliance with the terms of the bond, tendered the vessel to the marshal, who declined to receive the same under instructions from the proctors for libellant. On August 15, 1923, the court, pursuant to stipulation of the parties, dated August 8, 1923, (Apostles, p. 28) ordered the marshal to accept the custody of the vessel.

It is contended by the appellants that this bond is a statutory bond given pursuant to Section 941 of the revised statutes. The pertinent portion of said section follows:

> "Sec. 941. (Delivery bond in admiralty proceedings—permanent bond by vessel owner). When a warrant of arrest or other process *in rem* is issued in any cause of admiralty jurisdiction, except in cases of seizures for forfeiture under any law of the United States, the marshal shall stay the execution of such process, or discharge the property arrested if the process has been levied, on receiving from the claimant of the property a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge of the court where the cause is pending, or in his absence, by the collector of the port, conditioned to answer the decree of the court in such cause. Such bond or stipulation shall

> be returned to the court, and judgment thereon, against both the principal and sureties, may be recovered at the time of rendering the decree in the original cause."

The bond given is clear and plain in terms; was not intended to and does not purport to comply with the above statute; it does not refer to the statute; it is not conditioned as the statute requires and is not given in double the amount of libellant's claim. In *Fidelity & Deposit Company of Maryland v. Duke*, 293 Fed. 661, Judge Bourquin, speaking for this court says:

> "In so far as the bonds to the bank are concerned, the evidence is insufficient to characterize them as statutory * * * The distinction between statutory and common law bonds cannot be ignored and is that the first conform to the statute, and the latter do not, even though so intended. (*City of Mount Vernon v. Brett*, 193 N. Y. 276; 86 N. E. 10). The character of the bond is determined by its terms and the circumstances of its execution."

The purpose of Section 941 is to afford the claimant an absolute statutory means of securing the release of a vessel. A claimant, if he chooses this method, does not need to call in the libellant in order to secure the release, but gives the bond direct to the marshal, conditioned as the statute requires, in an amount double the libellant's claim with approved surety. The marshal is the sole judge of the sufficiency of this form of bond and in practice re-

quires a literal and strict compliance with the statute. In admiralty practice and usage this kind of bond is rarely given. The bond given is usually made under the rules of the court or upon agreement of the parties.

Sec. 917 of the revised statutes (Barnes Code, 1287) provides:

> "Section 1287. Power of the Supreme Court to regulate the practice of district courts.—The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the circuit and district courts. (R. S. Sec. 917; Act Aug. 23, 1842, c. 188, Sec. 6, 5 Stat. 518)."

Of admiralty rules adopted by the Supreme Court under the above statute, the following should be mentioned:

> "Rule 12. Where any ship shall be arrested, the same shall, on the application of the claimant, be delivered to him either on a due appraisement, to be had under the direction of the court, *or on his filing an agreement in writ-*

ing to that effect signed by the parties or their proctors of record, and on the claimant depositing in court so much money as the court shall order, or on his giving a stipulation for like amount, with sufficient sureties, or an approved corporate surety, conditioned as provided in the foregoing rule."

"Rule 6. All bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before the clerk or a deputy clerk or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court or before any commissioner of the United States authorized by law to take bail and affidavits in civil cases, *or otherwise by written agreement of the parties or their proctors of record.*"

Rule 21 of the District Court admiralty rules provides that property seized by the marshal may be released in five different ways, the last method being "by an order duly entered upon the written consent of the proctor for the party or parties on whose behalf the property is detained."

Rule 58 provides:

"Stipulations, mitigation of. The court, on satisfactory proof of the inability of the party to comply with the usual stipulations in a cause, may mitigate and modify such stipulations conformably to the equities or exigencies of the case. (Adm. Rule, Supreme Court, 6)."

Under the above statute, (R. S. 917) and the admiralty rules of the District and Supreme Court pursuant thereto, the District Court possesses the authority to release the *res* under the bond here given, which admittedly is not the usual bond conditioned for the payment of the judgment, but given in the alternative for the payment of the judgment or the safe return of the *res*. Particularly is this true where the bond recites that it was made upon agreement of the parties and bore the written approval of the proctors for the libellant, before being submitted to the court. In other words, it purports itself to be and is a bond given by agreement and not under statute.

Proctors for the libellant in their oral argument, state that the bond was approved by them through inadvertance or by mistake, and that they were under the impression that a statutory bond was being given. The bond is so plain in terms that the most casual reading would show that it is not a statutory bond but a common law obligation. It would be most unjust to permit libellant to take advantage of its own mistake or carelessness and treat this as a statutory bond as contended for and thereby wholly destroy the effect of the alternative condition and in fact write an entirely new contract for the surety which it never intended to enter. The bond is essentially a common law bailment with the condition that the *res* would be redelivered or the judgment paid. There is the alternative in the

undertaking, which being performed, acquits the obligation.

From an equitable standpoint the libellant is in exactly the same position and in no worse position than if the bond had never been given. The libellant furnished the repairs upon which its libel is founded upon security of the vessel. The vessel was redelivered in the same condition as seized to answer claim of libellant. No physical deterioration of the vessel or additional charges or encumbrances while out on bond were shown or contended for. Unfortunately the sale of the vessel did not bring sufficient to satisfy in full libellant's claim and other claims. However, all of the other claims existed at the time and were created prior to the original seizure by the marshal at libellant's instance.

When we refer herein to the libellant we mean the Seattle Shipbuilding & Dry Dock Company, as the bond was for the benefit of such libellant and it is elementary and so conceded in appellant's brief that none of the other intervening libellants have any claim against the bond. (Benedict's Adm. 4 Ed. par. 409).

Appellants rest their principal contention upon the proposition that, if the vessel was once discharged, the court had no power to order its redelivery to the marshal. In every case cited by appellants, the bond was an absolute undertaking to pay the judgment; they have failed to cite a single authority where the bond was in the alternative and the release therefore conditional. However,

there are many instances in admiralty where the authority of the court to re-arrest a vessel once discharged upon bond has been upheld. The general rule being, that in cases of fraud or mistake, or when the *res* has been improvidently released, the court possesses ample power to order its return to the custody of the marshal.

The Thales, 3 Ben. 327 Fed. Cas. No. 13855;

Livingston v. The Jewess, 1 Ben. 21, note Fed. Cas. 8412;

The Virgo, 13 Blatchf. 225 Fed. Cas. No. 16976;

The Favorite, 2 Flipp. 86 Fed. Cas. No. 4698;

2 Parsons Shipping & Admiralty 411;

United States v. The Haytian Republic, 154 U. S. 117, 38 L. Ed. 930;

United States v. Ames, 89 U. S. 35, 25 L. Ed. 295;

The Three Friends, 166 U. S. 68, 41 L. Ed. 920;

Braithwaite v. Jordan, 5 N. D. 213, 31 L. R. A. 246, 65 N. W. 706.

In *The Union*, 4 Blatchf. 90 Fed. Cas. 14346, cited by appellants, the court says:

> "I agree that if there has been any mistake or fraud connected in entering into the stipulation and the vessel has been improvidently discharged, it would be competent for the court to relieve the parties concerned on application,

within a reasonable time, by ordering the vessel back into the custody of the officer."

In *The Favorite*, 2 Flipp. 86, Fed. Cas. 4698, the court mentioned certain cases cited by the appellant, and states:

"It is claimed, however, that the vessel, having once been released from custody is forever discharged of the lien and the court has no power to order her re-arrest. *The Union* (Case No. 14346), *The White Squall* (Fd. 17570), *The Kalamazoo*, 9 Eng. Law & Eq. 587, *The Old Concord* (Case No. 10482). In none of these cases, however, was there any mistake or fraud at the time the stipulation was signed. In *The Union* and *The Kalamazoo*, the amount of damages claimed in the libel was increased. In *The White Squall* the vessel was returned to custody by consent of the parties, against the protest of a person having an interest in the vessel; and in *The Old Concord* the sureties had become insolvent. Conceding that the court has no power to order the re-arrest of a vessel once fairly discharged upon a binding stipulation or for a cause not existing at the time of the stipulation was accepted, I am clearly of the opinion that this power exists, whenever through mistake or fraud a stipulation has been accepted which was not binding upon the parties signing it. An order will be made for the re-arrest of the vessel."

In the instant case the vessel was remanded to the custody of the marshal by order of the court pursuant to a written stipulation of the parties (Apostles pp. 28 and 30). Without this stipulation undoubtedly the court sitting in admiralty under its recognized and established equitable powers would upon the seasonable application of the surety have ample jurisdiction to recall the vessel under the authorities above cited, upon the theory that the release of the vessel under the bond as conditioned was improvident.

There are many instances where courts of admiralty have enforced bonds not as statutory bonds but as common law obligations. In *The Alligator*, 1 Gall. 145, Fed. Cas. 248, the property was delivered to the claimant by order of the district court upon bond being given to respondent in the appraised value in case of final condemnation. It was contended the court had no authority to deliver the property on bond as unwarranted under the statute upon which the case was being prosecuted.

Judge Story says:

> "Whether there be any statute existing which authorized the delivery on bond or not is not in my judgment material. This cause was a civil cause, of admiralty and maritime jurisdiction, and nothing can be better settled, than that the admiralty may take a fidejussory caution or stipulation in cases in rem, and may in a summary manner award judgment

and execution thereon. The District Court possessing this jurisdiction and being fully authorized to adopt the process and modes of proceeding of the admiralty (*Respublica v. Lacaze*, 2 Dall (2 U. S.) 118. See also (*Brymer v. Atkins*, 1 H. Bl. 164), had an undoubted right to deliver the property on bail and to enforce a conformity to the terms of the bailment. In what manner this security is taken, whether by a sealed instrument or by a stipulation in the nature of a recognizance, cannot affect the jurisdiction of the court. Without doubt, unless a different rule were prescribed by statute, the best course would have been to take an admiralty stipulation, But a bond, even supposing it were void, as such, which is not admitted might yet be good as a stipulation. In all cases of this nature, the security whatever may be its form, is taken by order of court upon the voluntary application of the party, and therefore is *apud acta.* Having jurisdiction of the principal cause, the court must possess jurisdiction over all the incidents, and may by monition, attachment or execution, enforce its decrees against all who become parties to the proceedings."

While the appellants have been unable to find a single authority that deals in the alternative bond, supporting their contention, the following are in point and directly to the contrary. In the case of *Bell and Casey v. Thomas*, 8 Ala. 527, the bond for

the delivery of the vessel was conditioned to deliver the steamboat to the sheriff at a certain time or to pay and satisfy such judgment as should be rendered on the libel. Judgment for condemnation and also against the stipulators on the bond was rendered by the trial court. The Supreme Court of Alabama reversing the lower court held that the judgment against the stipulators on the bond was premature, "inasmuch as the condition of the bond is to deliver the boat to the sheriff on a particular day or to pay the judgment of the court * * * it is essentially different from a stipulation to pay the amount for which judgment shall be rendered * * * It is not important to inquire whether the bond taken is in precise conformity with that required by the statute, and if it was variant from that, and could only be supported by it as a common law obligation, yet it is within the jurisdiction of a court proceeding, according to the course of admiralty practice to render judgment on such an obligation as an incident to the principal cause." In *Murphy v. Roberts and Staples*, 30 Ala. 232, the Court, on a similar state of facts, says:

> "The bond required by the statute is 'to pay such judgment as shall be rendered.' The bond given was to pay the judgment, or to 'have forthcoming, and well and truly deliver, said steamboat,' etc., 'to answer such decree, sentence and judgment as may be rendered against her.'
>
> "The admiralty practice in the United States

is intended to be simple and summary. * * * The judgment against the stipulators in this case was premature. The legal effect of their bond was, that they would have the steamboat, her tackle, apparel and furniture, forthcoming for the payment of such judgment as should be rendered in the cause, or that they would pay the judgment themselves. They had the option of doing the one or the other, and they were under no obligation to do either, until judgment of condemnation was rendered against the boat. * * * The judgment should not have been rendered against the stipulators, until they were placed in default, by a failure to deliver the property which their bond required them to deliver. The circuit court could not safely anticipate their failure to comply; and hence should not have pronounced a prospective judgment against them."

Lane v. Townsend, Fed. Cas. 8054, was a proceeding in admiralty where the person of the respondent was attached under process. The bond was conditioned that the respondent should appear and answer to the process and should abide and perform the judgment of the court. The plaintiff secured a money judgment, and the surety on the bail bond committed the principal to jail and claimed release thereby. The court, in a lengthy and well considered opinion, exonerates the surety and in part states:

"The stipulation ordinarily required in per-

sonal actions, that in *judicio sistendi*, answers more nearly to special bail than Blackstone supposed. Its object was substantially the same and nothing more, that of sustaining and rendering effectual the jurisdiction of the court against the person of the defendant. It was no part of its object to enable the actor to receive his debt of the fidejussors. When that was intended, a different stipulation was required. When its objects were substantially attained, the equity of the praetor relieved the fidejussors against the words of the instrument. If then the court is to be governed by the spirit of that jurisprudence, which is admitted to have exercised a controlling influence in regulating its practice, the inquiry will be, whether the plaintiff has had substantially the benefit of this stipulation. The person of the respondent in the original libel was surrendered as soon as the fidejussors were called on by legal process to surrender him, and the libellant has had an opportunity of taking him in execution, if he had chosen to do it. The courts of common law hold this to be a sufficient compliance with the condition of a bail-bond to discharge the bail. It is said, indeed, that in this case their discharge is *ex gratia* and not *ex debito justitiae*. But what was once favor and indulgence, by the practice of the court has been converted into a right. In this state, from the earliest period of its judi-

cial history, the bail could always surrender the principal on *scire facias*, as a matter of right. This clear and strong expression of professional opinion, indicated by the uniform practice of the courts, that a surrender on the *scire facias* is such a performance of the condition of the bond, as in equity should discharge the bail, carries with it an authority not easily resisted. And if it is held sufficient to exonerate the bail by the courts of common law, it should, by at least as strong a reason, be so held by a court of admiralty, which professes to administer justice *ex aequo et bono* in the liberal spirit of a court of equity."

The appellants further rely upon the final part of the condition of the bond: "The principal shall *either* pay any judgment * * * and abide * * * by any * * * decree, or in lieu thereof, shall redeliver said vessel and abide by any such judgment as the same may be made."

The terms are plain and explicit and the intention to either pay the judgment or return the vessel could not be made clearer. Undoubtedly under the terms of this bailment, if the vessel was damaged while out under bond, or additional liens or charges were created against her, the surety, under this final clause of its bond, would be compelled to make these good. However, such is not the case. The vessel was redelivered in the same condition and the libellant suffered no loss due to her temporary release.

In conclusion, may be quote from Judge Neterer's

decision, and we are unable to make a better statement of the whole than the following:

> "This order having been entered pursuant to the agreement of the parties (there being nothing in the law prohibiting it), and the vessel having been returned in obediance to the stipulation, the parties may not now avoid the alternative provision of the stipulation. The court may not make a contract. The recitals in the bond are conclusive. The purpose for which it was given is plain. The intent of the parties appears clearly to be in the alternative, and having been agreed to by the proctors for the libellant and approved by the court the jurisdiction of the court extends to the *rem* to the extent that the vessel may be returned to the marshal pursuant to the stipulation in the bond, and if the vessel is in the same condition that it was when released the exemption must obtain. That the liens attached when the vessel was released is established. There is no testimony of physical deterioration. All of the lien claimants are in the same situation as if the stipulation had not been given, and have gained the keepers expense for the time the vessel was out of the marshal's custody. The court no doubt had jurisdiction to direct the marshal upon the record in this case to receive the ship under the terms of the bailment."

We respectfully submit that judgment of the

District Court in releasing the surety should be affirmed.

GRINSTEAD, LAUBE & LAUGHLIN,

Proctors for Fidelity and Deposit Company of Maryland.

HARTMAN & HARTMAN,

Proctors for Kunkler Transportation & Trading Company.